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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. LEON DEAN LONG, Appellant.	2 CA-CR 2008-0089 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF GILA COUNTY

Cause No. CR2007-212

Honorable Peter J. Cahill, Judge

VACATED IN PART; AFFIRMED IN PART

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E S P I N O S A, Judge.

¶1 After a jury trial, appellant Leon Long was convicted of possession of drug paraphernalia, possession of drug paraphernalia for sale, and possession of a dangerous drug for sale. He was sentenced to concurrent, presumptive prison terms of 1.75 years for each of the drug paraphernalia charges and ten years for the drug possession charge.[1] On appeal, he challenges his convictions and sentences. For the reasons below, we vacate his conviction and sentence for possession of drug paraphernalia for sale and affirm his remaining convictions and sentences.

Factual and Procedural Background

¶2 We view the evidence and all reasonable inferences drawn from the evidence in the light most favorable to sustaining the convictions. *State v. Garza*, 196 Ariz. 210, ¶ 2, 994 P.2d 1025, 1026 (App. 1999). In March 2007, a Gila County sheriff's deputy initiated a traffic stop of Long's car when he observed it speeding and crossing the center line. After searching the car and locating a bag containing what appeared to be methamphetamine, the deputy placed Long under arrest and found in his pocket a pipe for smoking methamphetamine. The bag found in Long's car held 10.87 grams of methamphetamine in several smaller bags, each containing a salable quantity of the drug. Long admitted the pipe and the drugs were his.

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[1]Although the sentencing minute entry reflects a single sentence for both paraphernalia charges, it is inferable from the transcript of the sentencing hearing that this omission was an oversight, and because we vacate one of the sentences, the discrepancy is immaterial.

¶3 At trial, the state alleged that the pipe was the basis for the possession of paraphernalia charge and that the bags containing the methamphetamine were possessed with the intent to sell and requested jury instructions explaining that possession of drug paraphernalia for sale was a separate crime from simple possession. On the second and final day of trial, the court questioned the state about the charge of possessing drug paraphernalia for sale and accepted its explanation that this was a "routine[] charge." The court then instructed the jury that the state was required to prove both that Long possessed drug paraphernalia and that he intended to use the paraphernalia for the purpose of sale. The jury found him guilty of all charges as previously noted. At sentencing, the court found a number of aggravating as well as mitigating factors and imposed the presumptive terms outlined above. This appeal followed.

Discussion

Possession of Drug Paraphernalia For Sale

¶4 Long and the state agree it was error for the trial court to allow the trial to proceed on the charge of possession of drug paraphernalia for sale because there is no such crime in Arizona. We, too, agree that this was error, *see State v. Miranda*, 200 Ariz. 67, ¶ 5, 22 P.3d 506, 508 (2001) ("Courts may not add elements to crimes defined by statute . . . ."), but disagree with the state that it was harmless. *See State v. Sanchez*, 174 Ariz. 44, 45-46, 48, 846 P.2d 857, 858-59, 861 (App. 1993) (vacating guilty plea as fundamental error when trial court accepted plea for nonexistent crime). Long's conviction for possessing drug paraphernalia for sale is, therefore, vacated.

¶5 Long argues, however, for the first time on appeal, that the erroneous charge prejudiced him as to all charges. Because he did not raise this argument in the trial court, we review only for fundamental error. *See State v. Tarkington*, 218 Ariz. 369, ¶ 6, 187 P.3d 94, 95 (App. 2008). To succeed in a fundamental error analysis, Long must show "'error going to the foundation of the case,'" that prejudiced him. *Id*., *quoting State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005). Long contends the improper charge "prevented him from receiving a fair trial" because it did not allow the jury to find he had possessed the paraphernalia for personal use and thus, "channel[ed] the jur[y's] deliberations toward a guilty verdict on the charge of possession of dangerous drugs for sale."[2] Citing *State v. Knorr*, 186 Ariz. 300, 921 P.2d 703 (App. 1996), Long maintains that, because the verdict forms did not allow the jury to find him guilty of "simple possession of paraphernalia in regard to the plastic bags containing the drugs," this "strongly suggest[ed] to any reasonable juror that possession of dangerous drugs must have been for sale, since the plastic bags containing the drugs could not be found to be for personal use." He also argues that "[t]here was no instruction whatsoever that explained to the jurors that the for-sale-or-not-for-sale status of the drugs could be considered separately from the status of the bags containing the drugs."

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[2]Long specifically argues only that the erroneous charge prejudiced him as to the drug possession for sale charge, and we cannot discern any other way in which he was prejudiced. Both parties agree that, to find Long guilty of the fictitious crime of possession of drug paraphernalia for sale, the jury was first required to find him guilty of simple possession, the charge that would have been proper under these circumstances. *See* A.R.S. § 13-3415. Furthermore, he does not allege, nor have we found, any evidence admitted against him that would not have been admitted had he been charged only with possession of the bags.

¶6 We find *Knorr* inapposite. There, the verdict forms did not give the jury the option to acquit the defendant of both manslaughter and the lesser-included offense of aggravated assault or to find him guilty of either crime. 186 Ariz. at 303, 921 P.2d at 706. "[T]he jury was not given a verdict form by which to find him not guilty on the aggravated assault charge, and was not instructed to find [him] not guilty on that charge if the state had not established [the elements of the crime]." *Id*. This was fundamental error because "the jurors could have reasonably believed that, were they to find that the state had not proven manslaughter in this case, they were to find defendant guilty of one of the other lesser offenses instead," and there was evidence the jury was confused. *Id*. at 304, 921 P.2d at 707.[3] Here, Long does not dispute the jury was given verdict forms sufficient to find him guilty or not guilty of any offense charged; he argues only that the elements of one charge "channeled jury deliberations" on a different charge and rendered the jury incapable of finding him guilty of the lesser offense of simple possession of drugs if it did not find him guilty of possession with the intent to sell.[4]

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[3]Long also cites *State v. Briggs*, 579 N.W.2d 783 (Wis. Ct. App. 1998), for the proposition that a trial court has no jurisdiction over a nonexistent crime. We have already acknowledged that principle in vacating the charge of possession of paraphernalia for sale. Long's claim that the erroneous charge deprived the trial court of jurisdiction "over any of the three charges," is not supported by *Briggs* or any other authority of which we are aware.

[4]Long's counsel, however, stated in closing arguments, "[T]he State points out that the methamphetamine was packaged for sale. Now, I have no basis to contest that." This admission undercuts his argument that the charge somehow "channeled" deliberation on a matter not actually in dispute.

¶7 Furthermore, the jurors were expressly instructed that charges do not constitute evidence and that each count alleged a separate and distinct offense that they were to consider independently from any other count of the indictment. We presume juries follow the instructions they are given. *See State v. Cruz*, 218 Ariz. 149, ¶ 25, 181 P.3d 196, 205 (2008), *cert. denied*, ___ U.S. ___, No. 08-6083, 2009 WL 56300 (Jan. 12, 2009). Absent any other support for this argument in the record, we disagree that the erroneous paraphernalia charge necessarily influenced the jury's guilty verdict on the charge of possessing a dangerous drug for sale, particularly when the evidence of that offense was overwhelming. *Cf. State v. Weaver*, 158 Ariz. 407, 409, 762 P.2d 1361, 1363 (App. 1988) (admission of "irrelevant, unfairly prejudicial" evidence harmless error when properly admitted evidence of guilt overwhelming).

¶8 Because Long has failed to demonstrate fundamental error, we conclude the erroneous charge did no more than cause the state to prove an additional element not required by statute—that Long not only possessed the bags containing methamphetamine but intended to sell the bags as well as the drugs. *See* A.R.S. § 13-3415. Accordingly, although we disapprove of the state's alleging and the trial court's acquiescing in the prosecution of a nonexistent crime, we find no prejudice requiring reversal of Long's other convictions.[5]

[5]Long attacks the trial judge in his reply brief, asserting the court's error "raises a serious question as to whether [the] trial was supervised by a judge prepared and capable of acting as a fair and impartial referee" and "lend[s] support to the idea that the judge was not paying attention or was insufficiently learned." He further asserts "[i]t is incredible that this issue was not discussed before the trial ever began" and that the court should have declared a mistrial. Allegations of incompetence and partiality are serious matters, and we caution counsel against making them lightly. Because Long does not meaningfully argue that the

Cf. State v. Velazquez, 216 Ariz. 300, ¶ 34, 166 P.3d 91, 100 (2007) (alleged fundamental error in jury instructions does not warrant reversal when no prejudice resulted), *cert. denied*, ___ U.S. ___, 128 S. Ct. 2078 (2008).

Threshold Amount

¶9 Long argues for the first time on appeal that the trial court erred in failing to explain to the jury what the term "threshold amount" meant for purposes of the charge of possession of a dangerous drug for sale.[6] Assignments of error not raised below are reviewed only for fundamental error that prejudiced the defendant. *State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 7, 185 P.3d 135, 138 (App. 2008). Without citation of authority, Long argues the court was required to instruct that "no presumption of an intent to sell arose until the amount equals or exceeds the threshold amount." As the state correctly notes, however, under §§ 13-3401(36)(e) and 13-3407(D), the threshold amount of nine grams is relevant only at sentencing and does not create any presumption at all. Accordingly, the court did not err, let alone commit fundamental error, when it failed to further instruct the jury on the legal

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court was actually incompetent or biased, we can only conclude that his railings are insult superfluous to this appeal. "Should a lawyer be faced with genuine misconduct, there are appropriate avenues available for him or her to address it . . . [. B]ald and unfounded accusations of judicial impropriety in briefs filed with this court is not such an avenue. In so doing, counsel [oversteps] the bounds of appropriate appellate advocacy." *Peters v. Pine Meadow Ranch Home Ass'n*, 151 P.3d 962, ¶ 8 (Utah 2007). And, as to the claim this issue should have been "discussed before the trial ever began," we note the error did not appear in the initial indictment, nor did Long raise it before trial or request a mistrial.

[6]The jury was instructed: "The threshold amount of methamphetamine is nine (9) grams." The verdict form clearly indicated the jury was required to find Long guilty of possession of a dangerous drug for sale before it determined whether the state had proved the amount he possessed was "above the threshold amount."

significance of the term "threshold amount"; indeed, it might have created trial error had it so instructed. *See State v. Koch*, 138 Ariz. 99, 105, 673 P.2d 297, 303 (1983) ("trial court's jury instructions generally should not touch on the subject of punishment except to advise the jury not to consider it").

Sufficiency of Evidence

¶10 Long next argues the state did not present sufficient evidence of intent to support his conviction for possessing a dangerous drug for sale. We will not overturn a conviction for insufficiency of evidence unless there was a complete lack of evidence supporting the conviction. *State v. Johnson*, 215 Ariz. 28, ¶ 2, 156 P.3d 445, 446 (App. 2007). At trial, the state presented evidence that Long possessed 10.87 grams of methamphetamine, individually bagged in salable amounts, as well as testimony about the quantities of the drug commonly possessed by users as opposed to dealers of methamphetamine.[7] Moreover, at trial, Long implicitly conceded the drugs were intended

[7]Long disputes the state's evidence regarding amounts of drugs typically possessed, arguing without citation to authority that "[a]ny time at all spent reading [about cases involving] methamphetamine will quickly expose a person to the term 'eightball,' which is slang used for an eighth of an ounce, and it is not at all uncommon to see cases of possession for personal use that involve eightballs or multiples of eightballs." Long accuses the state of "low-ball[ing] the average-consumption purchase . . . to unfairly, and by deliberate misrepresentation, give itself a lower burden of proof," and argues this strategy "apparently discouraged trial counsel from attempting to argue anything like a so-called 'Costco defense.'" This claim is misplaced on appeal for a number of reasons. Most importantly, this argument was not made in the trial court and is raised here for the first time. Second, it is the exclusive province of the jury, not the appellate court, to weigh evidence and determine the credibility of the witnesses. *See State v. Lucero*, 204 Ariz. 363, ¶ 20, 64 P.3d 191, 194 (App. 2003); *State v. Hernandez*, 191 Ariz. 553, ¶ 11, 959 P.2d 810, 814 (App. 1998). Third, we have no obligation to consider bald assertions made in lieu of legitimate legal arguments.

for sale; as defense counsel stated in closing argument, "the State points out that the methamphetamine was packaged for sale. Now, I have no basis to contest that."[8] In light of the evidence and Long's acquiescence in the state's contention, there was ample evidence of intent to support the jury's verdict.

¶11 Long also argues for the first time on appeal that insufficient evidence supports the jury's conclusion that the drugs confiscated from his vehicle actually exceeded the statutory threshold amount because their total weight was only slightly over the threshold quantity and "there was no evidence as to whether the 10.87 grams included the weight of the plastic bags." The appellate court, however, is not a forum to retry a case without a jury. The state presented evidence of weight, and Long had the opportunity to dispute that evidence through cross-examination or the presentation of other evidence. The jury was in the best position to evaluate the evidence and the credibility of witnesses, and we will not second-guess its findings of fact on appeal. *See Lucero*, 204 Ariz. 363, ¶ 20, 64 P.3d at 194; *Hernandez*, 191 Ariz. 553, ¶ 11, 959 P.2d at 814.

See Ariz. R. Crim. P. 31.13(c)(vi); *State v. Moody*, 208 Ariz. 424, n.9, 94 P.3d 1119, 1147. Finally, Long does not explain what a "Costco defense" is or why the state would be required to present its case in such a way as to encourage one.

[8]Long additionally asserts there was "reasonable doubt" he possessed the drugs with intent to sell because he is "middle-aged and worked as a craftsman" and therefore has "wider resources than is typical of the drug's more numerous youthful users [and] would be quite likely to purchase more of the drug than is average." This is yet another argument that should have been made in the trial court and we will not re-weigh the evidence on appeal. *See Lucero*, 204 Ariz. 363, ¶ 20, 64 P.3d at 194.

Sentencing

¶12 Finally, Long raises several arguments, again for the first time on appeal, pertaining to the trial court's finding of aggravating factors at sentencing. We need not address this issue, however, since Long did not receive an aggravated sentence. Because the court imposed presumptive sentences on each count, its findings regarding aggravating factors are immaterial. *See State v. Johnson*, 210 Ariz. 438, ¶¶ 10-13, 111 P.3d 1038, 1041-42 (App. 2005) (no error when court considered aggravating factor not found by jury but sentenced defendant to presumptive terms); *cf. State v. Ramsey*, 211 Ariz. 529, n.7, 124 P.3d 756, 770 n.7 (App. 2005) (trial court's consideration of "lack of remorse" as aggravating factor did not warrant resentencing in view of "additional aggravating factors" court cited and presumptive sentence imposed); *State v. Ruggiero*, 211 Ariz. 262, n.6, 120 P.3d 690, 697 n.6 (App. 2005) (defendant failed to establish fundamental, prejudicial error in trial court's consideration of her "failure to accept responsibility" in aggravating sentence). *But see State v. Pena*, 209 Ariz. 503, ¶¶ 22-26, 104 P.3d 873, 879 (App. 2005) (remanding for resentencing based on trial court's consideration of improper aggravating factors even though defendant received mitigated sentence).

¶13 Long asserts, however, again without citation to authority, that, because he presented evidence of mitigating factors to the court and because all but one of the aggravating factors found by the court were found in error, a presumptive sentence was improper. But this is not the law. Even assuming *arguendo* that the court erred in finding aggravating factors, it was not required to impose a mitigated sentence. *See* A.R.S.

§ 13-702(D);[9] *cf. State v. Olmstead*, 213 Ariz. 534, ¶ 5, 145 P.3d 631, 632 (App. 2006) ("when only mitigating factors are found, the presumptive term remains the presumptive term unless the court . . . determines that the amount and nature of the mitigating circumstances justif[y] a lesser term"). Long has not demonstrated the court erred in imposing presumptive sentences on each count.

Disposition

¶14 For the foregoing reasons, Long's conviction and sentence for possession of drug paraphernalia for sale are vacated. His remaining convictions and sentences are affirmed.

PHILIP G. ESPINOSA, Judge

CONCURRING:

JOSEPH W. HOWARD, Presiding Judge

JOHN PELANDER, Chief Judge

[9]The sentencing provisions in Arizona's criminal code were recently renumbered, effective January 1, 2009. *See* 2008 Ariz. Sess. Laws, ch. 301, §§ 1-120. We refer to the statute as it was numbered at the time Long committed his offenses.